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In The

Supreme Court of the United States

October Term, 1992

IN RE ATLANTIC RICHFIELD COMPANY,

Petitioner.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit And The Honorable Dorothy W. Nelson And Stephen Reinhardt, Judges, United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT USA PETROLEUM COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990), this Court held that a vertical maximum price-fixing agreement "does not cause a competitor antitrust injury unless it results in predatory pricing." This Court declined, however, to define predatory pricing. *Id.* at 341 n.10. Consistent with this decision, the Ninth Circuit held that, on remand to the district court, "USA is entitled to attempt to prove that ARCO conspired to set predatory prices." 972 F.2d 1070, 1076 (9th Cir. 1992). ARCO filed a petition for rehearing and suggestion for rehearing *en banc* that relied, in part, on the Fourth Circuit's decision in *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 964 F.2d 335 (4th Cir.), *cert. granted*, 113 S. Ct. 430 (1992). After the petition for writ of certiorari in that case was granted and after ARCO filed a brief as *amicus curiae*, the Ninth Circuit withdrew ARCO's petition for rehearing from submission pending this Court's decision in *Brown & Williamson*. ARCO's petition for writ of mandamus presents the following questions:

1. Whether ARCO's petition is premature, given that the Ninth Circuit is reconsidering its decision based on ARCO's petition for rehearing and suggestion for rehearing *en banc*.

2. Whether ARCO has failed to demonstrate the drastic and extraordinary circumstances required for writs of mandamus, given that the Ninth Circuit is faithfully following this Court's mandate in both of the following respects:

QUESTIONS PRESENTED – Continued

a. The Ninth Circuit's holding that USA Petroleum does not suffer antitrust injury unless it proves predatory pricing is consistent with this Court's mandate.

b. This Court declined to define predatory pricing and left that issue open for determination on remand.

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BRIEF OF RESPONDENT USA PETROLEUM COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

The writ of mandamus sought by petitioner Atlantic Richfield Company ("ARCO") is completely unjustified and impermissible under the narrow guidelines of 28 U.S.C. § 1651. Respondent USA Petroleum Company ("USA")[1] respectfully requests that this Court deny the petition for writ of mandamus.

[1] USA's corporate affiliates and subsidiaries, not wholly owned, are USA Petroleum (Bermuda) Limited, Isla Petroleum Corporation and Gasolinas de Puerto Rico Corporation.

REASONS FOR DENYING THE WRIT

This Court's power to issue an extraordinary writ is a drastic and sparingly exercised remedy, reserved for cases where there is an usurpation of judicial power and appeal is a clearly inadequate remedy. *Parr v. United States*, 351 U.S. 513, 520-21 (1956); *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-84 (1953). An extraordinary writ is *not* intended as a substitute for a petition for writ of certiorari filed after final judgment in the court of appeals. In this case, ARCO's petition for writ of mandamus raises the identical issue regarding the scope of this Court's mandate on which ARCO based its pending petition for rehearing and suggestion for rehearing en banc in the Ninth Circuit. If, after the Ninth Circuit rules on ARCO's petition, ARCO is dissatisfied with the outcome, ARCO intends to petition for a writ of certiorari. (Petition at 3 & n.2.) ARCO has failed to articulate any reason why normal appellate procedures do not adequately protect its rights.

Unfortunately, ARCO's petition also illustrates one of the reasons that extraordinary writs are reserved for truly exceptional cases. As this Court observed, "[extraordinary writs] have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him." *Bankers Life*, 346 U.S. at 384-85 (*quoting Ex Parte Fahey*, 332 U.S. 258, 259-60 (1947)). ARCO's serious charges against two of the judges on the Ninth Circuit panel is completely unjustified. Nothing in the Ninth Circuit's initial decision on remand usurps this Court's authority. The majority opinion expressly acknowledged twice that this Court

reversed its judgment and conscientiously construed this Court's mandate, a matter within its jurisdiction.

ARCO apparently believes that the Ninth Circuit will refuse to grant it relief to which it is *not* entitled under this Court's decision. This is not justification for a writ of mandamus and this Court should reject ARCO's attempt to use the All Writs Act to maintain concurrent appeals.

ARCO FAILED TO SATISFY ITS BURDEN ON A PETITION FOR WRIT OF MANDAMUS[2]

ARCO bears the heavy burden of demonstrating that its right to issuance of the writ of mandamus is "clear and indisputable." *Bankers Life*, 346 U.S. at 384. To justify a writ of mandamus, ARCO must demonstrate that (1) adequate relief cannot be obtained in any other form or from any other court, and (2) the writ will be in aid of the Court's appellate jurisdiction. ARCO has not, and cannot, establish either one of these requirements.

A. ARCO's Petition For Writ of Mandamus Is Duplicative and Unjustified

ARCO's pending petition for rehearing and suggestion for rehearing *en banc* before the Ninth Circuit on the very issue of this Court's mandate provides an adequate

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[2] USA vigorously disagrees with ARCO's statement of the case. Because most of the issues are not necessary to the resolution of ARCO's petition, USA does not include a separate "Statement of the Case." To the extent relevant to ARCO's petition, USA disputes ARCO's assertions in the body of this brief.

forum for it to obtain the judicial remedy it seeks. Concurrent appeals on the same issue by the same party are impermissible.

By filing a petition for rehearing, which requested the same relief sought from this Court, ARCO destroyed the finality of the very decision it contends violated this Court's mandate. *Department of Banking v. Pink*, 317 U.S. 264, 266 (1942). The uncertainty created by a petition for rehearing is precisely why a motion for rehearing tolls the time within which review in this Court must be sought. *Missouri v. Jenkins*, 495 U.S. 33, 45-46 (1990). "[W]hile the petition for rehearing is pending, there is no judgment to be reviewed." *Id.* at 46. As recently described by this Court, the principal purpose of a petition for rehearing is to give the court an opportunity to determine whether or not its judgment should be modified. *Id.* at 46 n.14; *Pink*, 317 U.S. at 266. Had ARCO not intended to affect a change in the majority's decision, it could not have properly filed a petition for rehearing.

At this stage, therefore, the outcome of the Ninth Circuit's review is simply unknown.[3] The Ninth Circuit's Order of March 17, 1993, (ARCO's Appendix C) merely evidenced a desire by the original panel to await this Court's decision in *Brown & Williamson*, a case on which ARCO relied in its petition for rehearing and in which

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[3] ARCO's citation to *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978), is misplaced. In that case, the litigant petitioned for a writ of mandamus from a *final* decision of the district court. There was no possibility that the district court would modify its order. *Id.* at 494-95.

ARCO submitted a brief as *amicus curiae* before this Court. Nothing more can be gleaned from the Ninth Circuit's order. It is presumptuous and unreasonable for ARCO to conclude from this order that its petition for rehearing and suggestion for rehearing en banc has been denied.

Given that it is impossible for this Court to compare its mandate with an as-yet-to-be-determined final decision from the Ninth Circuit, this Court should deny ARCO's petition for writ of mandamus and permit the Ninth Circuit to complete its review of ARCO's petition before it.

B. The Ninth Circuit Is Following This Court's Mandate on Remand.

Even assuming that the Ninth Circuit's original decision on remand will be unaffected by ARCO's petition for rehearing and suggestion for rehearing en banc, a writ of mandamus in this case would still be improper. There is absolutely nothing in the original Majority Opinion in this case to support ARCO's contention that a writ of mandamus is necessary because of the Ninth Circuit's refusal to follow this Court's mandate. (Petition at 12.)

1. The Scope of this Court's Mandate.

This Court remanded the case to the Ninth Circuit "for proceedings consistent with this opinion." *ARCO*, 495 U.S. at 346. Under this mandate, the Ninth Circuit must determine what was decided by this Court and what issues were left for determination on remand. *Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979); *Sprague v. Ticonic*

National Bank, 307 U.S. 161 (1939); *Hartford Life Insurance Co. v. Blincoe*, 255 U.S. 129, 134 (1921).

It is well established that, on remand, the Court of Appeals is free to adjudicate any issues not decided by the Supreme Court. *Quern*, 440 U.S. at 347 n.18; *Sprague*, 307 U.S. at 168. The lower court is foreclosed, however, from reconsidering matters decided by the Supreme Court. *Quern*, 440 U.S. at 347 n.18; *Sprague*, 307 U.S. at 167-68.

This Court's failure to decide an issue explicitly leaves that issue open for consideration by the lower court. *Perkins v. Standard Oil Co.*, 399 U.S. 222, 223 (1970) (*per curiam*); *Hartford*, 255 U.S. at 136-37. "Certainly omissions do not constitute a part of a decision and become the law of the case, nor does a contention of counsel not responded to." *Hartford*, 255 U.S. at 136.

As shown in its initial decision, the majority did not go beyond this Court's mandate. The Ninth Circuit simply remanded the case to the district court to determine whether USA could prove its case consistent with the legal standard established by this Court, and decided an issue expressly left open by this Court's decision. Both of these matters were within the Ninth Circuit's jurisdiction.

2. The Ninth Circuit Correctly Requires USA to Prove Price-Fixing at Predatory Levels

The single holding in this court's decision was that a vertical maximum price-fixing agreement "does not cause a competitor antitrust injury unless it results in predatory

pricing." 495 U.S. at 339. The Ninth Circuit's initial decision followed this mandate and held that "USA is entitled to attempt to prove that ARCO conspired to set predatory prices." 972 F.2d at 1076.

Contrary to ARCO's argument, this Court did not decide the basic issue of whether USA could prove predatory pricing that caused it antitrust injury. As this Court stated at the outset: "For purposes of this case we likewise *assume* that petitioner's pricing was not predatory in nature." 495 U.S. at 333 n.3 (emphasis added). This Court made that assumption because the Ninth Circuit's decision never reached the predatory pricing issue. 972 F.2d at 1073. Thus, on remand, the Ninth Circuit found that the factual merits of USA's predatory pricing claim remained to be adjudicated.

ARCO attempts to convert this Court's "assumption" into an "adjudication" by arguing that USA made no such showing before the district court on ARCO's motion for summary judgment. (Petition at 5-6.) The Ninth Circuit correctly rejected ARCO's attempt to rewrite its motion for summary judgment in order to fit this Court's decision. 972 F.2d at 1074 ("ARCO's motion for summary judgment did not controvert that [predatory pricing] claim.") Indeed, ARCO's summary judgment motion conceded that USA could raise a justiciable controversy on that issue. *Id.* at 1074 & n.4. Although ARCO now claims that it moved for judgment on whether its prices were predatory (Petition at 5), the plain language of its motion contradicts that assertion. ARCO requested judgment on one, and only one, basis:

> [T]he Rule 16 order should . . . dismiss USA's claims as legally defective on the ground that the ruling that there is no likelihood of successful monopolization precludes them from satisfying the 'antitrust injury' requirement.

(Docket Number (D.N.)* 83 at 2.)[4]

An "assumption" cannot, as ARCO contends, be reasonably construed to have decided the issue of whether USA could adduce facts on its claim that ARCO fixed prices at predatory levels. Although ARCO and the dissent below cite the Court's subsequent statements that USA could not prove antitrust injury (Petition at 8), those statements flowed from this Court's explicit *assumption*,

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* The D.N. citations refer to the list of Relevant Docket Entries in the Joint Appendix cited by ARCO.

[4] ARCO's motion, filed before any depositions were taken, did not challenge the allegations that ARCO fixed prices at predatory levels and the Ninth Circuit did not require USA to offer proof on that issue. 972 F.2d at 1074. Instead, USA argued that, even assuming a predatory pricing requirement, USA need not prove a dangerous probability of successful monopolization. (D.N. 89 at 11-13.) The district court granted summary judgment based solely on the lack of threatened monopolization. (ARCO's Appendix E, ¶¶ 2-4; 10/14/86 Tr. at 8.)

Nor did counsel waive its predatory price-fixing claim at oral argument. (Petition at 6.) The only point that USA conceded was the single issue raised by ARCO's motion: the lack of a dangerous probability of successful monopolization. Counsel stated that: "[I]t is not likely[,] viewing the retail gasoline market as a whole[,] that we could show that ARCO [ha]s a dangerous probability of monopolization." (10/14/86 Tr. at 10.) Both USA's opposition brief and counsel's oral argument preserved its predatory pricing claim as this Court described the offense in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8 (1986). (D.N. 89 at 8; 10/14/86 Tr. at 20-22.)

for purposes of its decision, that ARCO's fixed prices were not at predatory levels.

Notwithstanding ARCO's argument, this Court's decision in *NAACP v. Alabama*, 357 U.S. 449 (1958), does not stand for the proposition that an assumption may be converted into a finding. In *NAACP*, this Court made a *finding*, based on the underlying record, that the NAACP had complied with the production order except for membership lists. *Id.* at 243 (citing 357 U.S. 449, 465 (1958)). On remand, the Supreme Court of Alabama concluded that this Court was "mistaken." *Id.* at 242. This Court correctly held that the State's claim of mistake came too late. *Id.* at 243.

By contrast, this Court characterized the predicate of its decision as an assumption and not as a conclusion or finding. Because the Supreme Court did not decide whether ARCO's fixed prices were predatory, the Court did not enter judgment for ARCO; rather, it remanded the case to this Court to determine what the appropriate disposition should be. Consistent with that remand, the Ninth Circuit remanded the case to the district court for a factual determination of whether or not ARCO's fixed prices were at predatory levels.[5]

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[5] USA brought this lawsuit to challenge ARCO's scheme to eliminate the price competition afforded by independent gasoline marketers such as USA. Contrary to ARCO's description of the complaint, USA does *not* challenge any price reductions that resulted from ARCO's discontinuance of its credit card or any legitimate cost savings. (Petition at 4.) Instead, USA complained that ARCO fixed prices at predatory levels wherever its dealers competed with USA and other independents. (J.A. 18.) Further, ARCO's vertical maximum price-fixing scheme facilitated predatory pricing because it enabled ARCO and its

3. This Court Expressly Declined to Define Predatory Pricing and Left Open the Dangerous Probability of Successful Monopolization Issue

ARCO's contention that the Ninth Circuit failed to follow this Court's mandate by not requiring proof of a dangerous probability of successful monopolization ignores the simple fact that the Court did not even address this argument. This Court's decision did not even mention, let alone decide, the issue of whether antitrust injury in cases involving price-fixing at predatory levels requires a showing of dangerous probability of successful monopolization. While acknowledging that "a vertical price-fixing scheme may facilitate predatory pricing," (495 U.S. at 340 n.9), this Court stated: "We have no occasion in the instant case to consider the proper definition of predatory pricing, nor to determine whether our dictum in *Matsushita* that predatory pricing might consist of 'pricing below the level necessary to sell [the offender's] products,' [citation omitted], is an accurate statement of the law." *Id.* at 341 n.10.

Because this Court explicitly left this question open, there is absolutely *no* basis for ARCO's argument that the Supreme Court adopted a "dangerous probability of successful monopolization" requirement and that the Ninth

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dealers to share the loss from predatory pricing while at the same time imposing the full loss on USA and other independents that could not share losses through conspiracy with a supplier. With the independents eliminated, ARCO recouped its losses in the historically non-competitive, oligopolistic gasoline market.

Circuit's initial decision on remand conflicts with that mandate.[6] (Petition at 9-11.)

ARCO nevertheless argues that a threatened monopolization requirement may be inferred from the Court's rejection of USA's argument that requiring predatory pricing for purposes of antitrust injury would impermissibly blur the distinction between Section 1 and Section 2 of the Sherman Act. However, the Supreme Court's discussion is expressly directed to the question of "pricing practices" and nowhere mentions dangerous probability of successful monopolization:

> Respondent further argues that it is inappropriate to require a showing of predatory pricing before antitrust injury can be established when the asserted antitrust violation is an agreement in restraint of trade illegal under § 1 of the Sherman Act, rather than an attempt to monopolize prohibited by § 2. Respondent notes that the two sections of the Act are quite different. Price-fixing violates § 1, for example, even if a single firm's decision to price at the same level would not create § 2 liability. . . . In sum, respondent maintains that it has suffered antitrust injury even if petitioner's pricing was not predatory under § 2 of the Sherman Act.
>
> We reject respondent's argument. Although a vertical, maximum price-fixing agreement is unlawful under § 1 of the Sherman Act, it does not cause a competitor antitrust injury unless it results in predatory pricing. Antitrust injury

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[6] ARCO's petition for certiorari, which addressed only the basis of the Ninth Circuit's original decision, did not request review of the dangerous probability of successful monopolization issue.

> does not arise for purposes of § 4 of the Clayton Act [citation omitted], until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct [citation omitted]; in the context of pricing practices, only predatory pricing has the requisite anticompetitive effect.

Id. at 338-39 (emphasis in original; footnotes omitted).

This Court's quotation is crystal clear: To prove antitrust injury, USA need only prove price-fixing at predatory levels. There is no intimation that any additional showing, such as threatened monopolization, is required. In fact, this Court went out of its way to note the distinction between Section 1, which governs concerted activity and reaches unreasonable restraints of trade, and Section 2, which governs unilateral conduct and requires a showing of attempted monopolization. *Id.*

CONCLUSION

As premature and lacking in exceptional justification, ARCO's petition for writ of mandamus should be denied.

Respectfully submitted,

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